Filed 8/28/19 P. v. Wells CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHNNIE JABAAR WELLS, Defendant and Appellant.	B290261 (Los Angeles County Super. Ct. No. YA095108)

APPEAL from an order of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Johnnie Jabaar Wells (defendant) first pled no contest in case number BA451860 (the Assault Case) to a charge of assault by means of force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)) for hitting a jail inmate in the face with a hard plastic food tray. Pursuant to the plea agreement reached by the parties, the trial court sentenced defendant to four years in prison with 50 percent conduct credits, i.e., one day of credit for each day in pretrial custody. About a month later, defendant pled no contest to an earlier-filed robbery charge (§ 211), again pursuant to a plea agreement, in case number YA095108 (the Robbery Case). Under the terms of the deal reached by the parties in the Robbery Case, the trial court recalled the sentence in the Assault Case and resentenced defendant—treating the assault conviction as the subordinate term to the principal robbery sentence. The total sentence imposed was seven years in prison: three years for the robbery, doubled pursuant to the Three Strikes law, plus one year for the assault (one-third the mid-term of three years). Because defendant was a violent felon under the new aggregate sentence (by virtue of the robbery conviction), the trial court limited defendant's conduct credits to 15 percent of his actual time in custody. Defendant later submitted a post-judgment motion contending it was error to so limit his credits, the trial court disagreed, and defendant now seeks reversal.

The parties are familiar with the facts and our opinion does not meet the criteria for publication. (Cal. Rules of Court, rule 8.1105(c).) We accordingly resolve the cause before us, consistent

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[1] Undesignated statutory references that follow are to the Penal Code.

with constitutional requirements, via a written opinion with reasons stated. (Cal. Const., art. VI, § 14; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1261-1264 [three-paragraph discussion of issue on appeal satisfies constitutional requirement because "an opinion is not a brief in reply to counsel's arguments"; "[i]n order to state the reasons, grounds, or principles upon which a decision is based, [an appellate court] need not discuss every case or fact raised by counsel in support of the parties' positions"].)

* * *

1. Defendant contends the trial court committed procedural error in ruling on his post-judgment credits correction motion. Defendant made his motion under section 1237.1 which provides in pertinent part: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, which may be made informally in writing." Defendant complains the trial court wrongly dubbed his motion a "letter" and, in so doing, deprived him of the panoply of constitutional rights that he says must apply when resolving a section 1237.1 credits motion—which he sees as the equivalent of a full sentencing.

Defendant's appellate attorney, however, presented the credits correction motion to the trial court informally. The motion in our record has no filed stamp and instead simply bears a handwritten notation that the document was "received" by the trial court on January 2, 2018. The opening brief filed by

defendant's appellate attorney admits he did not file the motion by the customary formal in-court means and instead simply mailed the document to the superior court. Appellate counsel's motion also did not include on the caption page a date on which the motion would be heard (see Cal. Rules of Court, rules 3.1110, 4.111), as formally made motions commonly do when a hearing date has been reserved so as to enable calculation of the deadline for filing opposition.

Because appellate counsel mailed the motion to the superior court rather than filing it in court, it is understandable that the trial court dubbed the document a "letter" and treated the matter as an informal motion of the type section 1237.1 expressly permits. With the informal presentation by appellate counsel, the trial court was likewise entitled to proceed informally in resolving the motion.[2] Nothing in the text of section 1237.1 requires a trial court to hold a hearing on a motion made under that section or defines parameters for the informal process a trial court may follow in deciding a credits issue—so long as the court respects the key feature of a motion (formal or informal) that distinguishes it from the credit correction letters criticized in prior case law, namely, that a motion obligates a trial court to make a ruling.[3]

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[2] We need not decide whether, if counsel for defendant *had* followed formal motion filing procedures, the formal or informal designation of the motion was counsel's alone to make such that the trial court would have no discretion to decide on its own whether to proceed formally or informally.

[3] In *People v. Clavel* (2002) 103 Cal.App.4th 516 (*Clavel*), the Court of Appeal dismissed an appeal under former section 1237.1 even though the defendant, before appealing, had sent a credits

The trial court satisfied that obligation here, treating defendant's submission as an informal credits correction motion and denying it by minute order. Soliciting opposition from the People or holding a hearing was not required, though in some cases it may be the better practice. And it certainly is not true, as defendant unpersuasively argues, that a motion to correct sentencing credits is tantamount to a full sentencing hearing for constitutional purposes. Rather, the process that is due can vary under the circumstances. So long as a trial court makes a ruling after a reasonable determination on how informal the process may be in light of its own access to the necessary evidence, the

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correction letter to the trial court—a letter the trial court never acted upon. (*Id.* at pp. 517-518.) The defendant argued the dismissal was unwarranted because he had relied upon the letter procedure that earlier cases suggested was permissible. (*Id.* at p. 518.) *Clavel* rejected the defendant's argument because it believed former section 1237.1 required a motion, not a letter, as only the former compels a judicial ruling: "The difference between a formal motion and an informal letter is significant. Unlike a letter, a motion is necessarily a part of the record and compels judicial response. It is noteworthy that the trial court in this case apparently did not find it necessary to rule on the request set forth in the letter or respond to it in any other way. This informal procedure does not meet the needs of an orderly appellate process; nor does it fully protect the interests of criminal defendants." (*Id.* at p. 519.) Legislative history materials indicate the Legislature was aware of the *Clavel* holding when it amended section 1237.1 to permit raising credit correction issues by informal motion. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 249 (2015–2016 Reg. Sess.) as introduced, February 9, 2015, as proposed to be Amended in Committee, p. 3; Sen. Com. on Public Safety, Analysis of Assem. Bill No. 249 (2015–2016 Reg. Sess.), p. 4.)

issues raised, and the Legislature's concern for judicial economy, there is no violation of section 1237.1. (See, e.g., *People v. Shabazz* (1985) 175 Cal.App.3d 468, 474 [no violation of due process in amending judgment to correct credits without holding a hearing at which the defendant could be present and represented by an attorney; due process rights are protected by the opportunity for appellate review of the trial court's action].) With these factors in mind, we find no fault in the procedure the trial court followed in this case.

2. Defendant contends he is still entitled to the 50 percent conduct credits given in the Assault Case (166 days) because those credits were a term of his plea agreement in that case and the trial court's subsequent actions violated the agreement. We do not take issue with the defense position that 50 percent conduct credits were part of the plea agreement in the Assault Case. But a defendant may "expressly waive entitlement to section 2900.5 credits against an ultimate jail or prison sentence for past and future days in custody" provided the waiver is "knowing and intelligent." (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055.) That is what we have here.

There is no disputing the plea deal the parties reached in the Robbery Case was meant to supersede certain terms of the plea deal and sentence reached earlier in the Assault Case. To take the most obvious example, the plea deal as recited on the record in the Assault Case called for a four-year sentence for defendant's assault conviction whereas, under the deal the parties later reached in the Robbery Case, defendant would receive a one-year sentence for the assault conviction. Several features of the record likewise establish there was an agreement in the Robbery Case to limit defendant's conduct credits to 15

percent of his actual time in custody, a term that would supersede the prior agreement for 50 percent conduct credits in the Assault Case.

The 15 percent limitation was legally mandated for the aggregate sentence that the parties agreed on to resolve the Robbery Case. (§ 2933.1, subd. (a) ["Notwithstanding any other law, any person who is convicted of a [violent] felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit . . ."]; see also *In re Reeves* (2005) 35 Cal.4th 765, 772 ["We may confidently assume that an offender serving a sentence that combines *consecutive* terms for violent and nonviolent offenses is subject to the credit restriction imposed by section 2933.1[, subdivision] (a) for the entire sentence"]; *People v. Nunez* (2008) 167 Cal.App.4th 761, 768 ["[T]he 15 percent limit to presentence conduct credits applies to the offender, not the offense"].) We presume the parties agreed on a sentence that complies with, not contradicts, applicable law regarding credits earning.

That presumption is consistent with the advisements defendant received in entering his plea in the Robbery Case. Defendant confirmed on the record that he agreed the court would recall the sentence in the Assault Case so the court could treat the assault conviction as the subordinate term of the sentence for the robbery conviction. Defendant confirmed he understood he was pleading to a violent felony and he would "get only 15 percent credits in these cases."[4] Defendant

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[4] Defendant contends the trial court's reference to "these cases" should not be understood as a reference to the Assault Case and the Robbery Case but to the robbery charges that were then pending against defendant and a co-defendant because the

acknowledged, by initialing a box on the plea form he signed, that "jail or prison conduct/work-time credit [he] may accrue will not exceed 15%." When asked if he had any questions about the consequences of his plea in the robbery case, defendant said no. And as perhaps the best indication that defendant got exactly what he bargained for, when defendant appeared for sentencing weeks later and defense counsel inquired about the credits defendant would receive, the trial court limited defendant's conduct credits to 15 percent (though it rounded up) with nary a word of protest from the defense.[5]

Under these circumstances, we are convinced defendant knowingly and voluntarily waived the prior stipulation to 50

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trial court held a joint change of plea hearing with both men present at the same time. Defendant's interpretation of the trial court's "these cases" reference is, at a minimum, strained because both defendant and his co-defendant were charged in the same single "case" (YA095108) and the only other case at issue during the change of plea hearing was defendant's prior Assault Case. But even if defendant correctly understands what the court meant when it orally advised defendant of the 15 percent limitation on "these cases," the plea form that defendant initialed broadly stated he would not accrue conduct/work-time credit beyond 15 percent.

[5] Defendant argues he did not waive his 50 percent custody credits that were part of the sentence in the Assault Case because the trial court did not give a section 1192.5 advisement when taking his plea in that case or the Robbery Case. The lack of a section 1192.5 advisement is of no consequence because the trial court adhered to the terms of the plea deal the parties reached in the Robbery Case. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1223-1224.)

percent credits when he accepted the terms of the plea deal and new aggregate sentence in the Robbery Case.

3. Defendant asserts the trial court's recall of sentence in the Assault Case violated section 1170, subdivision (d), which gives a court, "within 120 days of the first day of commitment, the authority on its own motion to recall the sentence and resentence the defendant 'for any reason rationally related to lawful sentencing' [citation], 'provided the new sentence . . . is no greater than the initial sentence.'" (*People v. Karaman* (1992) 4 Cal.4th 335, 351; see also § 1170, subd. (d) ["[T]he court may, within 120 days of the date of commitment on its own motion, . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. . . . Credit shall be given for time served"].) The Attorney General contends the argument is meritless because defendant's sentence in the Assault Case was recalled pursuant to section 1170.1, subdivision (a), not section 1170, subdivision (d).[6] Even assuming defendant

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[6] Section 1170.1, subdivision (a) provides, in relevant part: "[W]hen any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each

is correct that the sentence was recalled under section 1170, and even further assuming that the issue is cognizable in this appeal of the trial court's ruling on defendant's credits correction motion, the trial court did not err. The sentence imposed for defendant's assault conviction after recall of the original sentence in the Assault Case was not greater than that initial sentence. In fact, it was markedly reduced (one year versus the prior four years) as a result of its treatment as the subordinate term. The "loss" (we would say waiver) of conduct credits that was necessary to accommodate the new aggregate sentence structure and the reduced prison term for defendant's assault conviction did not result in a "greater sentence."

4. Defendant argues the trial court's ruling on his credits correction motion violates constitutional double jeopardy, procedural due process, and substantive due process guarantees. These are not serious arguments. Rather, they are unpersuasive attempts to place a constitutional gloss on the arguments we have already discussed and rejected. There was no constitutional violation.

5. Finally, in supplemental briefing, defendant argues the court operations assessments, convictions assessments, and restitution fine imposed at defendant's sentencing in the Robbery Case should be stricken pursuant to the holding in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). The argument, however, is outside the scope of this appeal, which is taken solely from the trial court's ruling on defendant's post-judgment credits

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consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . ."

correction motion. A *Dueñas* challenge on appeal would lie only from an appeal of the original May 2017 sentencing at which the fine and assessments in question were imposed.

6. The Attorney General, in his respondent's brief, argues we should order the judgment corrected to award defendant one fewer day in conduct credits. The Attorney General argues the trial court erred because 15 percent of 237 actual days in custody comes out to 35.55 days and the trial court was obligated to round down to 35 rather than up to 36 as it did, because section 2933.1 states a person convicted of a felony offense "shall accrue *no more than* 15 percent of worktime credit, as defined in Section 2933." (§ 2933.1, subd. (a), italics added.)

Prior cases have held both that a reviewing court may correct an unauthorized sentence at any time and that a court's miscalculation of a defendant's credits constitutes an unauthorized sentence. (See, e.g., *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173 [citing *People v. Scott* (1994) 9 Cal.4th 331 for the proposition that a Court of Appeal "may correct an unauthorized sentence on appeal despite failure to object below"]; *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 ["A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered"].) But we are aware of no published authority that holds we *must* correct a credit calculation error where, as here, the People have not first brought the asserted miscalculation to the trial court's attention. (Cf. *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270 [observing section 1237.1 by its terms applies only to appeals by a defendant but noting "[t]he constitutional problem that would be presented if the statute were to be construed to allow such corrections when sought by the People, but to refuse it when

sought by the defendant"].) We decline to act on the Attorney General's request without prejudice to the People's prerogative to seek correction in the trial court.

DISPOSITION

The trial court's order is affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.